

**BROOK & ASSOCIATES, PLLC**

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May 1, 2019

**By ECF**

The Honorable Katherine H. Parker  
United States Magistrate Judge  
United States Courthouse  
500 Pearl Street  
New York, NY 10007

**Re:** *Daniel Kleeberg et al. v. Lester Eber et al.*, 1:16-cv-09517-LAK-KHP  
**Motion Conference Request to Seek Protective Order**

Dear Judge Parker,

I write on behalf of Plaintiffs in the above-named matter to request a conference to discuss a motion for a protective order against the Eber Defendants' efforts to take time-consuming and expensive discovery for the sole (improper) purpose of attempting to collaterally attack the 2017 Surrogate's Court proceedings in which the Allen Eber Trust was deemed terminated and its assets were ordered to be distributed to the Trust beneficiaries.

**Meet-and-Confer Requirement:** After receiving a Rule 30(b)(6) deposition notice from the Ebers to Canandaigua National Bank ("CNB") on April 4, 2019, I sent written objections on April 8, 2019. Afterwards, counsel for CNB indicated that he also had objections but was unavailable for some time before he could participate in a meet-and-confer. The parties spoke by telephone on April 25, 2019. Although some modifications to the Rule 30(b)(6) notice occurred as a result, the Ebers insist on questioning CNB's actions in Surrogate's Court. *See* Ex. A.

**Background:** In 2017, CNB petitioned the Surrogate's Court for Monroe County for an order terminating the Allen Eber Trust (the "Trust") and distributing its assets to the beneficiaries proportionate to their respective interests in the Trust. Notice of the petition was served on all co-trustees and beneficiaries, including Plaintiffs and Defendant Lester Eber, who was both a co-trustee and a beneficiary. Lester entered an appearance in the Surrogate proceeding.<sup>1</sup> Despite doing so, Lester did not object either to the termination of the Trust or to CNB's accounting and

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<sup>1</sup> Plaintiffs declined to incur the expense of entering an appearance through counsel, because they did not disagree with the requested relief or the accounting provided.

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BROOK & ASSOCIATES

proposed distribution of assets. And it was so noted in the Surrogate's Order for Judicial Settlement of Final Account of Successor Co-Trustee, Resignation and Discharge of Co-Trustee and Termination of Trust, dated June 1, 2017. *See* Ex. B at 1 ("THERE having been no Objections with the Court by any of the appearing parties; and ... UPON ... the appearance of Lester Eber..."). Lester did not appeal the Surrogate's Order, either.

In the summer of 2017, after entry of the Surrogate's Order, CNB made some minor adjustments to the final accounting based on discussions with Lester's counsel about some early distributions made to one of the beneficiaries' children that had to be accounted for. As a result, the final distribution of Trust assets did not match the percentages specified in the Surrogate's June 1, 2017 Order. Nonetheless, as to the assets that were successfully distributed, there is no dispute that the adjustments made were proper. That distribution occurred in October 2017.

In October 2018, a dispute arose about whether the Trust's stock in Eber Bros. & Co., Inc. ("EB&C") was distributed to the Trust beneficiaries. Lester then sought to acquire all of the shares himself, without giving Plaintiffs any consideration.<sup>2</sup> The legality of Lester's conduct *after* the entry of the Surrogate's Court June 1, 2017 Final Order is at issue in this case.<sup>3</sup>

**Prior Related Proceedings:** During the March 12, 2019 conference, the Ebers' personal lawyer John Herbert expressed the Ebers' desire to depose CNB about the "acts and omissions of Canandaigua as trustee of the trust *after June, 2017*." Tr. 28:17-18 (emphasis added) (attached as Ex. C). *See also id.* at 29:6 (examining the "summer of 2017"); *id.* at 36:12-37:6 (discussing concerns about how the June 1, 2017 Order was implemented "in July and August of 2017"). Although there were some questions raised by Mr. Herbert about CNB's basis for terminating the Trust, *id.* at 30, he later conceded that "[i]t is true that when it came on for adjudication, that Lester Eber did make an appearance there and did acquiesce in the final order." *Id.* at 36:4-6.

Based on that representation of the scope of the deposition, this Court said it would permit the Ebers to notice an additional deposition of CNB. It informed the parties that it is "granting the motion to intervene and then you [the Ebers] can notice that deposition." Tr. 37:19-20. The Ebers waited until April 4, 2019, to issue a deposition notice; specifically, a Rule 30(b)(6) notice with 19 enumerated topics. After the meet-and-confer, the Ebers reduced the number of topics slightly but said they "are not willing to eliminate questions regarding the Trust and its termination." *See* Ex. A (April 30, 2019 email transmitting revised Rule 30(b)(6) notice, with attachment).

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<sup>2</sup> Had Lester sought to obtain Plaintiffs' rightful portion of the stock through the Surrogate's Court proceeding, Plaintiffs would have then entered an appearance and objected accordingly.

<sup>3</sup> Although this Court has not yet ruled on Plaintiffs' motion for leave to amend to add such claims, the Court did permit CNB to intervene for purposes of those claims.

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**Argument:** A collateral attack on the Surrogate’s Court proceeding is indisputably impermissible. During the meet-and-confer, counsel of record for the Ebers, Colin Ramsey, conceded that it was not possible to collaterally attack the Surrogate’s order terminating the Allen Eber Trust, and he could not articulate any other basis for seeking such discovery. During the same call, however, his unofficial co-counsel John Herbert responded to the question about whether they were trying to collaterally attack the Trust termination saying, “I don’t know if we are or we aren’t.” Mr. Herbert proceeded to launch into arguments about why he believes the Trust should not have been terminated.

A collateral attack on the termination of the Trust is prohibited for two main reasons. First, because Lester Eber participated in the Surrogate’s Court proceedings, he is barred from challenging the result of them under the doctrine of *res judicata*. See *Thomas & Agnes Carvel Found. v. Carvel*, 736 F. Supp. 2d 730, 757 (S.D.N.Y. 2010) (“New York has adopted a transactional approach to claim preclusion, also referred to as *res judicata*. Thus, ‘a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.’”) (quoting *Monahan v. New York City Dep’t of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000)). Lester cannot relitigate matters that were already decided in that proceeding, and his efforts to gather discovery so he can try to do so should be headed off at the pass.

Second, the distribution of Trust assets is the quintessential stuff of the probate exception. It is exactly the opposite of the situation in *Marcus v. Quattrocchi*, where this Court found that the probate exception did not apply. See 715 F.Supp.2d 524, 534 (“Even assuming, *arguendo*, that the Trust was improperly terminated, Plaintiffs, at best, are asking the Court to return property currently in the Defendants’ possession to the Trust. Requests to return property to an estate or trust, rather than to dispose of property currently part of an estate or trust, do not fall within the probate exception because the *res* at issue is not within the probate court’s jurisdiction if it is was not part of the estate at the time of the decedent’s death.). Here, assuming that the EB&C shares still belong to the Trust (as the Ebers contend), then the Ebers would be asking this court “to dispose of property currently part of a[] ... trust,” and that would be improper.<sup>4</sup> If there is a bona fide dispute about whether the Surrogate’s Court ordered the EB&C shares distributed, see Tr. 36:6-11 (Mr. Herbert suggesting that the Surrogate’s Court’s order was not specific enough), it must be raised with the Surrogate’s Court.

Because there is no proper purpose of the discovery they seek and it would be burdensome to entertain even the possibility of challenging the Surrogate’s Court proceedings here, the Court

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<sup>4</sup> Here, Plaintiffs have claims seeking to have EB&C recognize Plaintiffs’ rights as shareholders. These claims assume, correctly, that the Trust has been terminated and that the distribution should be deemed made in accordance with the Surrogate’s Order, notwithstanding Defendants’ efforts to obstruct it. It only remains for the corporation and its Secretary—non-parties to the Surrogate proceeding—to take the appropriate corporate actions.

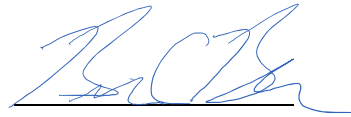
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**BROOK & ASSOCIATES**

should grant Plaintiffs and CNB a protective order against such discovery. The scope of the deposition should be limited to the conduct that occurred after the June 1, 2017 Final Order.

We thank the Court for its attention to this matter. It is my understanding that CNB will write separately.

Respectfully submitted,



Brian C. Brook

cc: All counsel of record

# Exhibit A



Brian Brook &lt;brian@brook-law.com&gt;

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**CNB 30(b)(6)**

---

**Ramsey, Colin D.** <cramsey@underbergkessler.com>

Tue, Apr 30, 2019 at 2:40 PM

To: "O'Brien, Dan" &lt;dobrien@woodsoviatt.com&gt;

Cc: Robert Calihan &lt;rcalihan@calihanlaw.com&gt;, "Keneally, Paul F." &lt;PKeneally@underbergkessler.com&gt;, Brian Brook &lt;brian@brook-law.com&gt;, John Herbert &lt;johnherbert24@mac.com&gt;

Dan/Brian-

I am attaching a revised 30(b)(6) notice for your consideration. As you will see, it reduces the number of topics and scope of the examination. However, we are not willing to eliminate questions regarding the Trust and its termination.

It remains our view that we are entitled to elicit facts relating to the termination of the Trust that will be useful to the defense of the claims and allegation in this litigation. We also believe that given the cost concerns that have been raised, scheduling the 30(b)(6) for a mutually convenient date and time will be far more cost effective for all parties, as compared to drafting a motion, traveling to NYC to argue it, etc.

The 30(b)(6) is currently noticed for May 13, 2019, but we are certainly amenable to finding an alternate date.

Colin

**Colin D. Ramsey**

PARTNER

cramsey@underbergkessler.com

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Underberg &amp; Kessler LLP

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Buffalo, NY 14202

716-847-9103 PHONE

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our most important partner is you®

**From:** O'Brien, Dan <dobrien@woodsoviatt.com>

**Sent:** Thursday, April 25, 2019 9:35 AM

**To:** Ramsey, Colin D. <cramsey@underbergkessler.com>

**Cc:** Robert Calihan <rcalihan@calihanlaw.com>; Keneally, Paul F. <PKeneally@underbergkessler.com>; Brian Brook <brian@brook-law.com>

**Subject:** CNB 30(b)(6)

Colin:

Your focus seems to be the Bank's justification for seeking to end the Trust (Topics 2(a) through (h)). The papers speak for themselves and, if your clients disagreed with the relief being sought, they had ample opportunity to make their objections known while the proceeding was pending. Mr. Eber, who was a trustee of the trust and was represented by counsel during the proceeding, could have opposed the Bank's petition but did not. Nor was any appeal of Judge Owens' order ever filed. As far as I can see, the proposed topics appear to be aimed at an improper collateral attack on the Surrogate Court's determination and, as a result, are irrelevant.

As far as the Bank's role with respect to the stock of Eber Bros. & Co., Inc. is concerned (Topics 1(i) through (v)), the parties have taken the deposition of Richard Hawks, the trust officer responsible for the management of the Trust and the person most knowledgeable about the Bank's limited role with respect to that stock. You need to explain to me why we need to provide another representative of the Bank to speak to this subject.

To the extent your 30(b)(6) notice addresses topics other than the management of the trust (Topics 3 and 4), you need to explain to me what relevance these topics have to the issues in this lawsuit and/or the Bank and why you believe that the Bank should, or does, have knowledge of these topics.

With respect to the "terms of the CNB settlement agreement with the Plaintiffs," it is my understanding that you and all other counsel were sent a copy of the settlement agreement on February 1st so you do not need a witness from the Bank to illuminate you in that regard.

Even if some of the areas of inquiry are marginally relevant, the incremental benefit of the 30(b)(6) deposition is far outweighed by the burden of preparing a witness or witnesses to testify as to these nineteen topics. The Trust was terminated almost two years ago and the Bank was dismissed from the case with prejudice on August 18, 2018, so compliance with your subpoena would impose a significant and costly burden on the Bank. As you know, but for your client's demand that the Bank deliver stock shares to him, the Bank would not have been forced to intervene and expose itself to the technical susceptibility to a notice such as the one your served. As I mentioned in my e-mail from yesterday, there was no counsel representing the Bank when the Magistrate Judge appeared to approve the service of such a notice, so we have never waived our right to object to the 30(b)(6) notice.

Finally, the focus of most of your proposed topics implicate the attorney-client and work product privileges. It is clear that the expected objections as to many, if not most, of the questions will require the Court's intervention and will place a significant burden on the Court's time and attention.

We hope this assists you in understanding our opposition to this notice. This e-mail does not purport to be an exhaustive list of our objections. We reserve all our rights and waive none in that regard.

Unless I hear otherwise, we will confer at 3:30 pm. Do you want to set up a conference call number?

Dan O'Brien, Esq.

Partner

Direct Dial: 585-987-2810

Direct Fax: 585-987-2910

dobrien@woodsoviatt.com

Firm Phone: 585-987-2800

Firm Fax: 585-454-3968

woodsoviatt.com



*PLEASE NOTE: We will be moving our offices soon. As of May 20, 2019 our new address will be:  
1900 Bausch & Lomb Place, Rochester, New York 14604*

*The addresses of our other offices in Buffalo and Phoenix will remain the same.*

*700 Crossroads Building 2 State Street Rochester, New York 14614*

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**From:** Ramsey, Colin D. [mailto:[cramsey@underbergkessler.com](mailto:cramsey@underbergkessler.com)]

**Sent:** Wednesday, April 24, 2019 6:09 PM

**To:** Brian Brook; O'Brien, Dan

**Cc:** Robert Calihan; Keneally, Paul F.

**Subject:** Re: CNB 30(b)(6)

Dan-

I am checking schedules for tomorrow and will advise asap. In the interim, can you give us a better sense of the nature of your objections so we can discuss internally in advance of call (and hopefully make call more productive)?

Thanks

Get Outlook for Android

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**From:** O'Brien, Dan <[dobrien@woodsoviatt.com](mailto:dobrien@woodsoviatt.com)>  
**Sent:** Wednesday, April 24, 2019 4:50:40 PM  
**To:** Ramsey, Colin D.; Brian Brook  
**Cc:** Robert Calihan; Keneally, Paul F.  
**Subject:** CNB 30(b)(6)

Colin:

I have spent some time reviewing your Rule 30(b)(6) deposition notice and have a number of objections to it. I propose we have a meet and confer tomorrow afternoon; in the event we cannot get your agreement to trim the scope of the notice substantially, I intend to seek relief from the Court. Insofar as you intend to argue that the Judge already approved this proposed 30(b)(6) deposition of CNB, I certainly wasn't present at any conversation or conference at which that was discussed so I do not see how my client or I could be bound by such a determination.

Let me know what time works for you.

Dan O'Brien

Dan O'Brien, Esq.  
Partner  
Direct Dial: 585-987-2810  
Direct Fax: 585-987-2910  
  
[dobrien@woodsoviatt.com](mailto:dobrien@woodsoviatt.com)  
  
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[woodsoviatt.com](http://woodsoviatt.com)



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COMMUNICATION IN ERROR, PLEASE DESTROY THIS COMMUNICATION, INCLUDING ALL ATTACHMENTS. PLEASE NOTIFY US IMMEDIATELY BY RETURN E-MAIL OR CALL 585-987-2800.

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**From:** Ramsey, Colin D. [<mailto:cramsey@underbergkessler.com>]  
**Sent:** Tuesday, April 23, 2019 7:01 PM  
**To:** O'Brien, Dan; Brian Brook  
**Cc:** Robert Calihan; Keneally, Paul F.  
**Subject:** Re: CNB 30(b)(6)

Dan-

As you know, 30(b)(6) is noticed for May 13th. Are you able to particularize any objections you have at this point? We are willing to listen and discuss, but Magistrate Parker has already blessed the deposition. Given Brian's threats to involve the Court, and the discovery deadline, it would benefit everyone to know where we stand asap.

Thanks, Colin

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**From:** Ramsey, Colin D.  
**Sent:** Friday, April 12, 2019 10:49:04 AM  
**To:** O'Brien, Dan; Brian Brook  
**Cc:** Robert Calihan; Keneally, Paul F.  
**Subject:** RE: CNB 30(b)(6)

Dan-

Will your objections relate to the topics/scope of the Notice, or the whole concept of a 30(b)(6)? If the latter, Magistrate Parker has already determined that we are entitled to the deposition. If the former, we will wait to see the nature of your objections. However, can you confirm that the noticed date of May 13th works (provided you or Brian do not move for a protective order)? If that date does not work, I would like to at least get an alternate date scheduled given the number of calendars we have to consult.

Brian-

In response to you email from yesterday, it does not make sense to speak until Dan is in a position to participate. While we will consider substantive objections, as previously advised, your demand that the Ebers pay your costs to attend the deposition is wholly rejected.

I am available most of the day on Monday, April 22nd, and in the later afternoon on April 23rd.

Colin

our most important partner is you®

Colin D. Ramsey  
PARTNER  
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[www.underbergkessler.com](http://www.underbergkessler.com)

Underberg & Kessler LLP  
50 Fountain Plaza, Suite 320  
Buffalo, NY 14202  
716-847-9103 PHONE  
716-847-6004 FAX

-----Original Message-----

From: O'Brien, Dan <[dobrien@woodsoviatt.com](mailto:dobrien@woodsoviatt.com)>

Sent: Friday, April 12, 2019 10:39 AM

To: Brian Brook <[brian@brook-law.com](mailto:brian@brook-law.com)>

Cc: Ramsey, Colin D. <[cramsey@underbergkessler.com](mailto:cramsey@underbergkessler.com)>; Robert Calihan <[rcalihan@calihanlaw.com](mailto:rcalihan@calihanlaw.com)>

Subject: Re: CNB 30(b)(6)

I am in the process of reviewing Colin's 30(b)(6) notice with CNB and intend to make formal objections. I am going to be out of the office all next week so it will be early the following week before I can provide those objections to you.

Dan O'Brien

Sent from my iPhone

> On Apr 11, 2019, at 5:22 PM, Brian Brook <[brian@brook-law.com](mailto:brian@brook-law.com)> wrote:

>

> Colin and Dan,

>

> Based on Dan saying today that he has issues with the Rule 30(b)(6) notice issued by the Ebers to CNB, and since Colin was unable to stay after the deposition today to discuss my issues that I raised earlier this week, I propose that we schedule a time when at least the three of us are available to meet and confer. I think we should do so as soon as possible since if we cannot come to an agreement we would need time to seek a protective order in advance of the May 13 date specified in the notice.

>

> I am currently free tomorrow after 11am and all Monday. Please let me know about your availability.

>

> And since Rob is so interested in CNB and talking about noticing more depositions, I am copying him on this as well so he can chime in if he wants to weigh in more generally on what additional depositions, if any, are appropriate for CNB here.

>

> Thanks,

>

> Brian

>

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**CNB 30(b)(6).docx**

21K

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

DANIEL KLEEGERG, LISA STEIN AND AUDREY HAYS,  
PLAINTIFFS,

V.

LESTER EBER, ALEXBAY, LLC F/K/A  
LESTER EBER, LLC, ESTATE OF ELLIOT W. GUMAER, JR.,  
EBER BROS. & CO, INC., EBER BROS. WINE AND LIQUOR  
CORP., EBER BROS. WINE & LIQUOR METRO, INC.,  
EBER CONNECTICUT, LLC, AND WENDY EBER,

DEFENDANTS.

Civil Action No.  
16-CV-9517(LJK/KHP)

**NOTICE OF DEPOSITION  
PURSUANT TO  
FED. R. CIV. P. 30(b)(6)**

CANANDAIGUA NATIONAL BANK & TRUST COMPANY,  
INTERVENOR- PLAINTIFF,

V.

LESTER EBER, ALEXBAY, LLC F/K/A  
LESTER EBER, LLC, ESTATE OF ELLIOT W. GUMAER,  
JR.,EBER BROS. & CO, INC., EBER BROS. WINE AND  
LIQUOR CORP., EBER BROS. WINE & LIQUOR METRO,  
INC., EBER CONNECTICUT, LLC, WENDY EBER,  
DANIEL KLEEGERG, LISA STEIN AND AUDREY HAYS,

INTERVENOR- DEFENDANTS.

**TO: THE CANANDAIGUA NATIONAL BANK & TRUST COMPANY (“CNB”)**

**C/C: DONALD O’BRIEN, ESQ.  
WOODS OVIATT GILMAN  
700 CROSSROADS BUILDING  
2 STATE STREET  
ROCHESTER, NEW YORK 14614**

PLEASE TAKE NOTICE that, pursuant to Federal Rules of Civil Procedure 30(b)(6), Defendants LESTER EBER, ALEXBAY, LLC f/k/a LESTER EBER, LLC, EBER BROS. & CO., INC., EBER BROS. WINE AND LIQUOR CORP., EBER BROS. WINE & LIQUOR METRO, INC., EBER-CONNECTICUT, LLC and WENDY EBER (the “Eber Defendants”) will take the deposition of CNB upon oral examination before a notary public at the law offices of Underberg & Kessler LLP, attorneys for the Eber Defendants, 300 Bausch and Lomb Place, Rochester, New York 14604, on the 13<sup>th</sup> day of May, 2019 at 10:00 a.m. in the forenoon of that day and at any adjourned date, in the above-entitled action now pending in the United States District Court in the Southern District of New York. CNB is requested to designate the person or persons most knowledgeable and prepared to testify on behalf of CNB concerning the subject matter described on Attachment A hereto.

Dated: April 30, 2019

---

Colin D. Ramsey, Esq.  
UNDERBERG & KESSLER LLP  
*Attorneys for the Eber Defendants*  
300 Bausch & Lomb Place  
Rochester, New York 14604  
Telephone: (585) 258-2800

**ATTACHMENT A**

1. CNB's role in holding, voting, transferring or otherwise handling any capital stock of Eber Brothers & Co., Inc. ("EB&Co."), as Co-Trustee of the Allen Eber Trust (the "Trust"), including, without limitation
  - i. CNB's actions relating to any EB&Co. capital stock after the Trust was ordered terminated by Order of the Monroe County Surrogate's Court on June 1, 2017;
  - ii. the purported transfers of shares of EB&Co. capital stock to Trust beneficiaries after June 1, 2017;
  - iii. stock powers executed by CNB with respect to the shares of EB&Co. capital stock registered in the name of the Co-Trustees;
  - iv. communications by CNB with respective beneficiaries; and
  - v. Receipts and Releases requested by CNB from the Trust beneficiaries.
2. All matters relating to Monroe County Surrogate's Court case (Case No. 1970DT01952), including, without limitation
  - a. the decision to terminate the Trust and the justification for doing so under the Allen Eber Will;
  - b. the preparation of the Petition and Final Accounting for termination of the Trust;
  - c. the proposed allocation of the Trust assets on July 12, 2017;
  - d. the proposed reallocation of the Trust assets on August 1, 2017, including the EB&Co. stock;
  - e. CNB's knowledge on or before June 1, 2017 of the allegations in the Plaintiff's complaint filed in December 2016;
  - f. CNB's knowledge of the terms of the settlement between the Eber entities and the PBGC in February 2017; and
  - g. the rights of Wendy and David Eber under Allen Eber's Will.
3. All matters relating to the transfer restrictions set forth in the Article XII of the EB&Co. Bylaws, including without limitation, any giving of the notice by the transferor required by Article XII, Section 1 of the Bylaws, and the exercise of the call right by Lester Eber on October 30, 2018.

# Exhibit B

CT

At a Surrogate's Court of the State of New York  
held in and for the County of Monroe at  
Rochester, New York, on May 18, 2017.

PRESENT: HON. JOHN M. OWENS, Surrogate

FINAL ACCOUNTING OF THE CANANDAIGUA  
NATIONAL BANK AND TRUST COMPANY, AS  
SUCCESSOR CO-TRUSTEE OF RESIDUARY  
TRUST UNDER WILL OF ALLEN EBER DATED  
OCTOBER 27, 1969

**ORDER FOR JUDICIAL  
SETTLEMENT OF FINAL  
ACCOUNT OF SUCCESSOR CO-  
TRUSTEE, RESIGNATION AND  
DISCHARGE OF CO-TRUSTEE  
AND TERMINATION OF TRUST**

File No. 1970<sup>DT</sup>1952 /D

UPON reading and filing the duly verified Petition for Judicial Settlement of Final Account of Successor Co-Trustee, Resignation and Discharge of Co-Trustee and Termination of Trust, verified by Petitioner, Canandaigua National Bank and Trust Company, on February 15, 2017; and

UPON all proofs of service having been duly filed with the Court; and

THERE having been no Objections filed with the Court by any of the appearing parties;  
and

UPON, the appearance of Canandaigua National Bank through its counsel, Woods Oviatt Gilman LLP, Lorisa D. LaRocca, Esq. and William G. Bauer, Esq., and the appearance of Lester Eber, through his counsel, Wiedman, Vazzana, Corcoran and Volta, P.C., James G. Vazzana, Esq. at an adjourned return date of this Court on May 18, 2017; and

UPON, the appearance of Calihan Law PLLC, Robert B. Calihan, Esq., on behalf of Elliott W. Gumaer, Jr., having been waived by the Court at counsel's request;

NOW, THEREFORE, it is hereby

**ORDERED, ADJUDGED AND DECREED** that the Final Account of Canandaigua National Bank and Trust Company, as Successor Co-Trustee of the Residuary Trust Under Will of Allen Eber dated October 27, 1969 (the "Trust"), is hereby judicially settled and Canandaigua National Bank and Trust Company is discharged from any liability in the administration of the

Trust from its receipt of assets until distribution of the Trust assets, in its capacity as Successor Co-Trustee of the Trust; and it is further

**ORDERED, ADJUDGED AND DECREED** that the Trust be terminated and that the Trust assets be distributed to the beneficiaries in accordance with the terms set forth in the Final Account and allowed as filed (and adjusted), and that the following is a summary thereof as settled:

### SUMMARY

#### PRINCIPAL ACCOUNT

##### CHARGES:

Schedule A	Principal received	\$1,409,047.07
Schedule AA	Subsequent receipts of principal	12,000.44
Schedule A-1	Realized increases in principal	5,842.73
Schedule G	Unrealized increases in principal	<u>163,793.19</u>
	Total Principal Charges	\$1,590,683.43

##### CREDITS:

Schedule B	Realized decreases in principal	\$ 768,370.36
Schedule C	Administration expenses	48,535.21
Schedule E	Distributions of principal	88,851.48
Schedule G	Unrealized decreases in principal	<u>10,827.35</u>
	Total Principal Credits	<u>\$ 916,584.40</u>

**Principal balance on hand shown by Schedule G** **\$ 674,099.03**

#### INCOME ACCOUNT

##### CHARGES:

Schedule AA-1	Income received	\$ 2,868.90
Schedule A-2	Income collected	203,676.91
Schedule A-3	Realized increases in income	<u>229.15</u>
	Total Income Charges	\$ 206,774.96

**CREDITS:**

Schedule C-2	Administrative expenses	\$ 18,778.18
Schedule E-1	Distributions of income	<u>170,529.29</u>
	Total Income Credits	\$ <u>189,307.42</u>
	Income remaining on hand as shown in Schedule G-1	\$ 17,467.49

**COMBINED ACCOUNTS**

Principal on hand:	Cash	\$ 35,523.28
	Other assets	<u>638,575.75</u>
	Total principal on hand	\$674,099.03
Income on hand:	Cash	<u>17,467.49</u>
	Total Assets on hand	\$691,566.52

**ORDERED, ADJUDGED AND DECREED** that petitioner pay the remaining cash and transfer, assign and deliver the other remaining assets as shown in the account as follows:

To: Canandaigua National Bank

As and for the commissions in the sum of \$ 8,114.86

To: Woods Oviatt Gilman LLP

For legal services rendered in the sum of \$ TBD

For costs and disbursements \$ TBD

Balance \$ 683,451.66\*

To be distributed as follows:

To: Daniel Kleeberg (1/6 share) \$ 113,908.61\*

To: Lisa Stein (1/6 share) \$ 113,908.61\*

To: Audrey Hays (1/3 share) \$ 227,817.22\*

To: Lester Eber (1/3 share) \$ 227,817.22\*

\*Less Woods Oviatt Gilman LLP fees and disbursements – amount to be determined.

**ORDERED, ADJUDGED AND DECREED** that, upon its completion of the distribution of the Trust assets, as set forth in the Final Account and this Order, Canandaigua National Bank and Trust Company shall be discharged as Successor Co-Trustee of the Trust; and it is further

**ORDERED, ADJUDGED AND DECREED** that, the sum of \$ 5757.50 in fees and 1460 in disbursements shall be paid from the Trust to Woods Oviatt Gilman LLP, as attorneys for Petitioner in connection with its services <sup>and disbursements</sup> in regard to this proceeding.

Dated: June 1, 2017

HON.

  
JOHN M. OWENS, SURROGATE

SURROGATE COURT  
MONROE COUNTY

JUN - 1 2017

FILED

# Exhibit C

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
KLEEBERG, et al., : Docket #16cv9517  
 : 1:16-cv-09517-LAK-KHP  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 EBER, et al., :  
 : New York, New York  
 Defendants. : March 12, 2019  
 :  
 ----- :

PROCEEDINGS BEFORE  
THE HONORABLE KATHARINE H. PARKER  
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

For Plaintiffs: BROOK & ASSOCIATIONS, PLLC  
BY: BRIAN BROOK, ESQ.  
100 Church Street, 8<sup>th</sup> Floor  
New York, New York 10007

For Defendants: UNDERBERG & KESSLER, LLP  
BY: COLIN D. RAMSEY, ESQ.  
50 Fountain Plaza, Suite 320  
Buffalo, New York 14202

For Defendants - JOHN HERBERT, ESQ.  
Wendy & Lester  
Eber:

Transcription Service: Carole Ludwig, *Transcription Services*  
141 East Third Street #3E  
New York, New York 10009  
Phone: (212) 420-0771  
Fax: (212) 420-6007

Proceedings recorded by electronic sound recording;  
Transcript produced by transcription service.

APPEARANCES (CONTINUED):

For Defendants -	CALIHAN LAW PLLC
Estate of Elliot	BY: ROBERT CALIHAN, ESQ.
W. Gumaer, Jr.:	The Power Building, Suite 761
	16 East Main Street
	Rochester, New York 14614

INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>	<u>Court</u>
None					

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
None				

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THE CLERK: Calling case 16cv9517, Kleeberg versus Eber. Counsel, please make your appearance for the record.

MR. BRIAN BROOK: Good afternoon, Your Honor, Brian Brook for the plaintiffs.

THE COURT: Good afternoon.

MR. COLIN RAMSEY: Good afternoon, Your Honor, Colin Ramsey for the Eber defendants.

THE COURT: Good afternoon.

MR. JOHN HERBERT: John Herbert for Wendy & Lester Eber.

THE COURT: Nice to see you.

MR. ROBERT CALIHAN: Bob Calihan on behalf of the Estate of Elliot Gumaer.

THE COURT: Okay, nice to see you all. All right, I want to address a couple of the pending motions. The first is the motion to intervene. I am going to grant the motion to intervene and I'll issue a short decision on that. With respect to the pending motion to amend, I'd like to hear some additional argument on that motion and I do have some questions that I'd like the parties to address. So just as a preview, defendants argue that some of the new claims are time barred, and I'd like to understand when you're saying the claims, the statute of limitations

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2 began to accrue, and I'd like to better understand  
3 when plaintiffs say that the claims accrued. So maybe  
4 we can start with this motion to amend, and Mr. Brook,  
5 could you explain when, the date when you think each  
6 of the new claims accrued from a statute of  
7 limitations standpoint?

8 MR. BROOK: Sure, Your Honor. Well, as far as  
9 the breach of fiduciary duty claims, and I think  
10 there's a few counts that encompass that, the  
11 fiduciary tolling rule applies. And I don't believe  
12 that the statute of limitations for those claims would  
13 have begun to run until the fiduciary relationship was  
14 terminated or openly repudiated. And I don't think  
15 there is any argument that there was some kind of open  
16 repudiation where Lester Eber said I'm no longer a  
17 fiduciary. So it's when it terminated, and our  
18 understanding is that it terminated when the trust was  
19 terminated. And although there is some dispute that  
20 became apparent during recent depositions as to  
21 whether the trust terminated, whether Lester is still  
22 a trustee, the latest that that could have occurred,  
23 or earliest I guess is the way to put it, is, say,  
24 February, 2017, when CNB filed its petition to  
25 dissolve the trust, and that was after this lawsuit

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2 was filed, and I think these claims certainly relate  
3 back. But even if they didn't, February, 2017, until  
4 when we filed the proposed third amended complaint is  
5 less than two years.

6 THE COURT: Okay, so the fraudulent, I mean  
7 the breach of fiduciary duty, I have that the new  
8 claims that you're suggesting to add would be the  
9 count three for unjust enrichment, count four to set  
10 aside an unlawful transaction, count five seeking an  
11 order for a new election of the board, count six, a  
12 declaratory judgment, and count eight, aiding and  
13 abetting breach of fiduciary duty and fraudulent  
14 concealment. Those are the ones that I have as new, so  
15 --

16 MR. BROOK: I think it's a little more  
17 complicated than that, if I may explain?

18 THE COURT: Okay.

19 MR. BROOK: So the first two counts, or at  
20 least the first one is breach of fiduciary duty.

21 THE COURT: Right.

22 MR. BROOK: Well, what used to be count one  
23 has been split into two counts in order to separate  
24 two different theories of breach of fiduciary duty for  
25 clarity sake.

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THE COURT: Right.

MR. BROOK: So they both were in the original complaint.

THE COURT: Right.

MR. BROOK: What happened for count one is that additional transactions were added, including the receipt of money for Lester Eber under a supposed consulting agreement with Southern Wine and Spirits. I think that's the one that probably, if I had to guess, was most contentious by the other side because that consulting agreement was originally entered into in 2007. And so because it's a breach of fiduciary duty claim and we are seeking equitable remedies such as an accounting, which we're still getting in pieces, and it also includes disgorgement of the profits that are received from that because it was essentially a corporate opportunity that was usurped because this was not even an acquisition or a merger, this was a transaction where it was essentially a settlement agreement between Eber Bros. and its competitor, Southern, that had driven them out of business. And Lester Eber, while remaining president and CEO of the Eber Bros. companies, also negotiated this side deal for himself. So it's something where we're seeking

equitable remedies in addition to, not only under a breach of fiduciary duty theory, but also under the standards set, I think it's in the new count four, we're citing the business corporation statute to set aside transactions that were not properly taken by the corporation.

So those are interrelated and I don't believe that there is a statute of limitations that applies for that kind of equitable remedy in this situation where you're setting aside a transaction. If it did, it would be six years from the date when the fiduciary relationship ended.

THE COURT: Which you're saying would be February of 2017.

MR. BROOK: At the absolute earliest. And that, and the trust wasn't ordered dissolved by the Court until June, 2017, but since it doesn't matter, let's just say February. And I think most of the other transactions in there I think are all part of what was in the original complaint, just spelled out in more detail.

So going through the counts, and the faithful servant doctrine, that was in the original complaint, as well, it has been spelled out in more detail

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2 because I'm one of those lawyers that likes to have a  
3 complaint that tells a little bit of a story and lets  
4 people know where we're going so that there is no  
5 surprise, and hopefully settle the case. I don't think  
6 there is anything in that that was not fairly included  
7 within the original ones. But count, what used to be  
8 count two, I believe, so the numbering being off is  
9 why the Court is under the impression that everything  
10 after count two is new, but, in fact, the fraudulent  
11 concealment claim was in the original complaint, I  
12 think that was count two. And the breach of --

13 THE COURT: No, I know that fraudulent  
14 concealment was in the prior complaint.

15 MR. BROOK: Okay, sorry. And then I believe  
16 that the aiding and abetting breach of fiduciary duty  
17 was also in the original complaint, I think that was  
18 count three. And then count four, if member serves,  
19 was the results for an accountant.

20 Unjust enrichment, you know, I don't think  
21 that the equitable, that we're not equitable.  
22 Fiduciary tolling would probably not apply to that  
23 count. I probably don't need it, so at the end of the  
24 day I don't know if I really care about that count,  
25 just to be perfectly frank, having thought about it

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2 more. But we also have the argument that separate from  
3 fiduciary tolling there were material facts about what  
4 made the Southern transaction wrong and usurpation of a  
5 corporate opportunity that we didn't discovery until  
6 discovery in this case. Most critically is the fact that  
7 somehow this agreement between Eber Bros. and Southern  
8 where Eber Bros. of New York agreed to go out of business  
9 and not compete with Southern anymore, did not include any  
10 provision against competition. That wasn't in the  
11 agreement, that doesn't make any sense, what kind of deal  
12 do you have to get your competitor to go out of business  
13 without a noncompetition clause? Well the answer is that  
14 they built it into Lester Eber's consulting agreement, and  
15 because Lester was remaining at the Helm of Eber Bros., it  
16 was effectively precluding Eber Bros. and its remaining  
17 operating entity, Eber Connecticut, from ever competing  
18 with Southern, but paying Lester a loan for that, not  
19 paying the company for giving up those future business  
20 opportunities it might have had.

21 THE COURT: What do you mean the loan, I thought  
22 that the agreement was a consulting agreement?

23 MR. BROOK: I misspoke, I meant consulting  
24 agreement. Apologize. So the consulting agreement  
25 with Lester, that was what was given to him, you know,

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2 it was \$600,000 a year for several years and then in  
3 the years since it's been \$310,000 a year for sort of  
4 untold consulting plus tens of thousands, if not  
5 hundreds of thousands of dollars a year in various  
6 reimbursements. So that money, we argue, is something  
7 that because it all derives from this contract that  
8 had this noncompetition clause that actually bound  
9 Eber Bros., because of Lester Eber remaining at the  
10 helm of Eber Bros., that that is a corporate asset.  
11 And because that fact was concealed until discovery in  
12 this case, the statute of limitations should not run  
13 on that until discovery. And then we have the two-year  
14 period after discovery to assert the claim.

15 THE COURT: Are you contending that pay for  
16 actual work performed under the consulting agreement  
17 by Lester Eber individually, is a corporate asset?

18 MR. BROOK: Not exactly, Your Honor. I think  
19 that there is certainly a right to be paid for actual  
20 work, the problem is the amount of money being paid,  
21 over \$3 million dollars in five years for supposed  
22 part time consulting. And the fact that this contract  
23 not only required some untold consulting, but also  
24 included that noncompetition clause. And my reading on  
25 these documents is that that is what this was really

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2 about, was about putting Eber Bros. down, but allowing  
3 Lester to get that money because they still had so  
4 many creditors at Eber Bros. that he wanted to avoid  
5 the money going to the creditors, and instead going to  
6 himself. And that's ultimately what a lot of the  
7 transactions in this case are about, is all the ways  
8 in which Lester Eber and his daughter tried to get  
9 money to go them instead of to the creditors, and  
10 ultimately to the shareholders, as well, had those  
11 creditors been paid off. And the exact numbers and all  
12 that I don't have off the tip of my fingers, but  
13 that's what that was about is that, you know, it's  
14 over \$4.5 million that was paid to Lester Eber for  
15 consulting with the competitor at the same time that  
16 he was getting a salary from Eber Bros. for continuing  
17 to work for them and preventing Eber Bros. from  
18 potential business opportunities.

19

20 So that, regardless of the merits of that  
21 claim but going to the statute of limitations, the  
22 point is that the key fact, what makes it at least  
23 inflated, we're not necessarily asking for the whole  
24 amount back but it's certainly inflated, and the  
25 inflated amount is because of that noncompetition  
clause in the consulting agreement that was only

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2 discovered in the course of discovery in this case and  
3 that was at the earliest sometime in late 2017. I  
4 personally didn't see it until mid-2018.

5 THE COURT: And are you saying your clients  
6 weren't aware of the consulting agreement?

7 MR. BROOK: They were aware of the consulting  
8 agreement generally, but they did not know that the  
9 consulting agreement is what included the prohibition  
10 against competition. And, in fact, Lester Eber misled  
11 Dan Kleeberg at one point into making Dan Kleeberg  
12 believe that he, as a former Eber employee, could not  
13 start a business with Eber in the name of it because  
14 there was a noncompetition clause with Southern.  
15 Lester never told Dan Kleeberg that well only I,  
16 Lester, am bound by that noncompetition clause. So  
17 what it shows is Lester, himself, treated the  
18 noncompetition clause in his own personal consulting  
19 agreement as something that was binding on the company  
20 and the entire family that had worked with him. And it  
21 was a corporate asset, it was something that he sold  
22 off, because it just makes no sense for a corporation  
23 to agree to go out of business, sell off its  
24 inventory, give a lot of it to its competitor and not  
25 include a noncompetition clause in those documents.

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2 What happened here was they modified it so that Lester  
3 could get paid more, but that money was money that  
4 should have gone to the company because it was a  
5 corporate asset, its ability to operate.

6 THE COURT: If the business is being sold and  
7 going out of business essentially, what would be the  
8 purpose of a noncompetition clause apart from the  
9 individual owner of the seller?

10 MR. BROOK: Well the whole business, only some  
11 parts like Delaware and I think Ohio were being sold  
12 to Southern. New York was going out of business and  
13 then Eber Bros. was continuing in Connecticut. But  
14 what happened was, and that was the Eber Connecticut  
15 entity, and so this noncompetition clause in Lester's  
16 consulting agreement made it so that Eber Connecticut  
17 and its affiliates, which included the parent  
18 companies, could not ever try to go back out again and  
19 do anything in New York or other states. And, in fact,  
20 something we learned at a recent deposition, it's not  
21 in the third amended complaint, obviously, since this  
22 was two weeks ago, is that apparently Lester Eber's  
23 son, David, went to work for Southern and they, rather  
24 than Eber Bros. trying to sell liquors and other  
25 imported goods into New York that it was bringing in

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2 from abroad because they have an import business  
3 aspect, as well, they were forced to go through  
4 Southern to do that. If it wasn't for this  
5 noncompetition clause, the company could sell wherever  
6 it wanted, it wouldn't have to go through Southern in  
7 order to do something in New York. And so it is a  
8 restriction on the business. And the amount is  
9 certainly inflated, because \$600,000 a year for some  
10 undocumented amount of, you know, a few hours here and  
11 there, is ridiculously inflated as a price. And some  
12 of the evidence of that is that after five years, the  
13 amount that Lester was being paid for consulting was  
14 cut in half.

15 THE COURT: Well what are you contending was  
16 the motivation for the sale of the Eber Bros. New York  
17 business and the other, outside of Connecticut, what  
18 was the motivation for the sale?

19 MR. BROOK: I'm sorry, there wasn't a sale of  
20 those assets and so -- there was no sale. What  
21 happened was the company agreed to shut down its  
22 business and Lester Eber agreed to not compete with  
23 Southern in his own personal contract.

24 THE COURT: Right.

25 MR. BROOK: So the money that should have gone

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2 to Eber for shutting down, to go to its creditors and  
3 maybe go to shareholders if there was some left over,  
4 Lester took for himself, and that's what was wrong.  
5 Because you can't, whether it's a merger, it's an  
6 acquisition, or you're selling off parts of a  
7 business, a corporate executive cannot say, okay, I'll  
8 give you this, but you give me this on the side so  
9 that I don't have to give it to the company, even  
10 though it's the corporate asset. Because the  
11 corporate's right to do business is what continued.  
12 Maybe it would be a different situation if Lester had  
13 resigned as Eber Bros. president so that restrictions  
14 on him for noncompetition did not carry over onto all  
15 the Eber companies. But he remained, and he continued  
16 to get a salary, a six-figure salary.

17 THE COURT: It was my understanding that Eber  
18 Bros. New York was not making any money and that there  
19 were significant debts, is that correct?

20 MR. BROOK: Yes, there were significant debts.

21 THE COURT: Do you know what the size of the  
22 debts were at the time that it shut down?

23 MR. BROOK: It's one of the many things that I  
24 have sought in discovery and it's a little hard to  
25 piece that together. I think -- the amount of the

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2 debts were substantial. The amount of, the money that  
3 Lester had taken from Eber Bros. through this side  
4 deal with Southern may very well have gone to pay the  
5 company's creditors, rather than to the shareholders.  
6 It doesn't matter who it would have ultimately gone to  
7 because at the end of the day we're asserting  
8 derivative claims on behalf of the corporation. So  
9 whether my client --

10

THE COURT: Right, but how would the company,  
11 what deal would have been entered into by Eber Bros.  
12 that the money would have gone to it from Southern?  
13 Are you saying Southern would have purchased the  
14 business, that's --

15

MR. BROOK: No, I'm not saying that.

16

THE COURT: So what are you saying, I'm trying  
17 to understand what you're saying should have happened,  
18 how is it that Lester would have been able to get  
19 Southern to give the company money sufficient to pay  
20 off all of its debts?

21

MR. BROOK: Well there was, for more context,  
22 there was a lawsuit filed by Eber Bros. against  
23 Southern, so part of this was a settlement of that.  
24 And so there was money being paid to Eber Bros. to get  
25 rid of the litigation and to just get them to go away

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2 quietly. So the fact is, Southern was paying Eber  
3 Bros., it was paying them to shut down business in New  
4 York, to give off I believe some of their assets. Eber  
5 Bros. was selling off interests that it had in  
6 Delaware and Ohio businesses as well. There was a  
7 large deal worth many, many millions of dollars and I  
8 believe it was an eight figure sum was paid to Eber  
9 Bros. by Southern. So there is no question that Eber  
10 Bros. and Southern were entering into a deal whether  
11 Southern was paying Eber Bros. to shut down. The  
12 problem is, when Lester took some of that and siphoned  
13 it off for himself, and it happened to be a critical  
14 part of it which is the noncompetition provision.  
15 Because what good would it do Southern to pay Eber  
16 Bros. off to shut it down only to have Lester Eber and  
17 Eber Bros. coming in from Connecticut or wherever, and  
18 continuing to creating problems, possibly taking, you  
19 know, retail sales from them.

20           And so the two-step part of that was they made  
21 him a consultant, even though he was still CEO and a  
22 fiduciary to Eber Bros. and they inflated the price  
23 significantly to include the noncompetition clause  
24 there. And that was how they had the excuse on their  
25 books of paying such an inflated amount to Lester

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2 Eber. And he got that by going around the company. So  
3 that, there was no signature from anyone at Eber Bros.  
4 on that consulting agreement approving of it for the  
5 company, as like additional compensation to Lester for  
6 negotiating the deal or something. There were any  
7 number of ways they could have given Lester a deal  
8 bonus that was aboveboard. This wasn't one of them,  
9 you can't take a corporate asset which is its ability  
10 to do business, and have that part of it be sold off  
11 just by giving it to Lester and letting him remain at  
12 the company.

13 THE COURT: You keep saying a deal, so I'm  
14 confused about what the deal is.

15 MR. BROOK: Sure. The deal was multifaceted  
16 again. Southern Wine & Spirits was paying Eber Bros.  
17 to shut down in New York, and it was paying Eber Bros.  
18 to give up its operating assets, and I think it had 50  
19 percent interest in a Delaware company and an Ohio  
20 company. It was settling litigation as well. This was  
21 a deal between Southern Wine and Spirits and Eber  
22 Bros. Wine and Liquor Corp. and in the middle of that  
23 deal --

24 THE COURT: As it a deal or was it a  
25 settlement agreement?

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MR. BROOK: It was a deal. It was far more than just a settlement. In fact, I don't think that there was a document officially called a settlement, it just said that they would drop the lawsuit.

THE COURT: Okay.

MR. BROOK: I'm not 100 percent on that, it's many, many pages long.

THE COURT: Okay.

MR. BROOK: But we're getting really far into the merits of this now --

THE COURT: Right, I understand.

MR. BROOK: And I certainly understand it is a claim that requires development. It's one of the reasons why I've noticed the deposition of Southern Wine and Spirits to occur on March 25<sup>th</sup>. And so hopefully getting more information there about how this was negotiated. Because surprise, surprise, no one could remember anything about how this was negotiated during their depositions. At least nothing in terms of the details or how the amounts were determined, things like that.

So what we do have though is a record of the amount being significantly greater when there was a noncompetition clause than in later years where there

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2 wasn't one. And based on that we see at least a \$1.5  
3 million enhancement to Lester as a result of that  
4 noncompetition. And we will provide expert testimony  
5 about how these transactions work and that in that  
6 kind of situation, the company's ability to compete is  
7 going to be something that should be considered a  
8 corporate asset that was usurped here. Because I think  
9 it is something that is technical enough that it  
10 probably does require expert testimony to establish  
11 that.

12 THE COURT: Okay.

13 MR. BROOK: And I don't think there is any  
14 dispute that when that aspect of the transaction was  
15 discovered was in discovery in this case and that  
16 whenever the date when that document was produced, we  
17 can use that as the date, it doesn't matter that I  
18 read it several months later because it's all still  
19 well within the statute. And that is separate and  
20 apart from the fiduciary tolling on the first two  
21 claims.

22 THE COURT: Okay. All right.

23 MR. BROOK: So you wanted to talk about counts  
24 five and six -- four, five and six are the ones  
25 regarding business laws and unwinding transactions.

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THE COURT: Right.

MR. BROOK: I am honestly not aware of any statute of limitation that applies to those and then the declaration of rights. A lot of those regard transactions that occurred just very recently, you know, documents that were being, transactions that were attempted in February, 2017, after this lawsuit was filed, there is no real statute of limitations argument there. I know it was confusing because the brief in opposition to the motion just said this is all outside the statute of limitations, but it's a lot more nuanced than that obviously. One of the most recent transactions that occurred was in October, 2018, when Lester sent his notice that he was going to just take my client's shares in Eber Bros. parent company for nothing. There is no way that is outside the statute of limitations.

THE COURT: Okay. All right --

MR. RAMSEY: Colin Ramsey.

THE COURT: Mr. Ramsey, yes.

MR. RAMSEY: Briefly, back to Southern, if I could, and not to get too deep in the woods, and I think Your Honor has anticipated our position is this was not a corporate opportunity, this was Lester Eber,

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2 individually, that entered into a consulting agreement  
3 with Southern. Eber Bros. was essentially bullied out  
4 of the market by Southern, that ship had sailed. There  
5 was no corporate opportunity to usurp at that point.  
6 They were out, there was an agreement amongst Southern  
7 and Eber Bros. that they were going to be out of New  
8 York. At that point, Lester Eber, given his numerous  
9 contacts, his experience in the industry, was offered  
10 this consulting position with Southern, he had every  
11 right to accept it.

12           The value of that consulting agreement, and  
13 Lester testified to this during his deposition, and I  
14 would anticipate that when we take the deposition from  
15 Southern, said, look, this is a large company, it pays  
16 generous salaries, this was commensurate with what  
17 other folks were getting doing similar things in  
18 similar areas of the country. So I know Mr. Brook  
19 wants to turn this essentially into a conspiracy that  
20 Lester was somehow funneling money to himself, that  
21 wasn't the case. He was receiving this money pursuant  
22 to an aboveboard consulting agreement. And if there's  
23 an issue with that, his consulting agreement was back  
24 in 2008, and by Mr. Brook's own admission, his clients  
25 were aware of it at that time. So any claims relating

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to that, I don't think there are any that are meritorious anyway, but certainly a decade later have sailed, to put it simply.

With respect to some of the other arguments that Mr. Brook made, essentially we're saying a lot of the factual predicates in this third amended complaint, a lot of the actions that are complained of, were not necessarily taken in a fiduciary capacity. He probably has a point on the fiduciary exception relationship if whatever he is relying on is taken in the capacity of a fiduciary. Many of them, at least some of them in the complaint, were not. And those are the ones, and I apologize, I don't have a brief in front of us, those are the ones that we're saying, look, if you are not doing this as a fiduciary, you don't get obviously the benefit of the fiduciary exception.

THE COURT: How much additional discovery, beyond what's already been contemplated, would be required by addition of these new claims from your perspective?

MR. RAMSEY: I don't know that it would be terrible significant. I think there would certainly be some additional depositions, one on the stock issue,

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2 for example, I think we're probably going to want  
3 further depositions of Canandaigua National Bank  
4 anyway, but certainly the stock issue that's raised in  
5 the third amended complaint would require additional  
6 depositions. Beyond that, some of the depositions that  
7 are outstanding might cover that, so I don't want to  
8 say, hey, look, we've got to do this whole new round  
9 of depositions, but there would at least be some  
10 additional discovery from our perspective now.

11 THE COURT: Okay, and how would that impact  
12 the timeline for discovery?

13 MR. RAMSEY: Well, as Mr. Brook said, we've got  
14 a Southern deposition noticed for the end of this  
15 month, we've got the deposition of Mark Stein, the  
16 brother of plaintiff, Lisa Stein, this Friday  
17 actually. There's been some talk of some other third  
18 parties that I think Mr. Brook wanted so I'll let him  
19 speak to that. But I would think a brief extension  
20 would probably be necessary, I don't think it would be  
21 too terribly wrong, a month or two would be my  
22 thought, subject to Mr. Brook's opinion.

23 THE COURT: Okay. Mr. Brook, from your  
24 perspective, how much additional discovery would be  
25 needed by these added claims and how would that impact

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the schedule?

MR. BROOK: I don't think there is any additional discovery that would be needed. I think the Southern deposition is more defensible with the third amended complaint in there in an active claim, but either way, Southern is important because this money that is going to Lester Eber was ultimately what was being used for him to make loans to the company. So the company, he's getting \$600,000 a year from the company and surprise, surprise, the company doesn't have enough money to pay its debts after that point, even though he's continuing to receive a six figure salary from him.

So understanding where that money was coming from and where it was going is part and parcel to understanding also how this debt crisis occurred that was ultimately the excuse that Lester used to take the company for himself as a creditor. You know, if the company had been getting \$600,000 a year from Southern instead, and Lester was just given credit for making that deal happen, and he was doing the same work for Southern that he did for Eber Bros. you know, he'd just continue to get paid by Eber Bros. for doing the work for the company. If he brought the deal into the

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2 company as a CEO of the company, rather than doing it  
3 on the side, the company would not have been in the  
4 credit crisis that it had. And that's an important  
5 part of the story that we need to tell, and  
6 understanding that with Southern, so that's the only  
7 one where, you know, if we had the third amended  
8 complaint in we'd get more.

9 I have no idea what Mr. Ramsey is talking  
10 about when he says he needs more depositions of  
11 Canandaigua National Bank based on the sock issue in  
12 terms of who owns the stock or not. That is an issue  
13 that is going to be decided entirely based upon two  
14 things, interpreting what the dissolution of the trust  
15 order says and the bylaws of the company and how those  
16 apply. And I think that from the depositions that  
17 we've had, the last one got unfortunately very heated,  
18 very emotional for Ms. Eber, you know, it's clear that  
19 they are under the impression that that issue is a  
20 silver bullet for them. That somehow they'll be able  
21 to just take the shares for nothing based upon that  
22 bylaw provision, and then Lester gets to run the  
23 family business without the family in it. And I  
24 believe they also brought up the intent under the Alan  
25 Eber Trust document, the will, itself. So maybe we'll

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2 also look at the will. But that's something that I  
3 believe is right for adjudication, and because it's  
4 seen as this silver bullet, I think it really should  
5 be resolved sooner rather than later, and I think it's  
6 going to take that being resolved before we even have  
7 a chance at seeing a real settlement offer that is  
8 close to valuing what my client's claims are worth in  
9 this case.

10 THE COURT: I think when we last spoke all the  
11 parties were in agreement that that was a legal issue  
12 that could be briefed, is that correct?

13 MR. HERBERT: I think that that's not so,  
14 because it's become a much more complicated issue.

15 THE COURT: Okay.

16 MR. HERBERT: I think that the actions, the  
17 acts and omissions of Canandaigua as trustee of the  
18 trust after June, 2017, raise a whole host of issues  
19 about the propriety of actions that they took. Some of  
20 the reasons why they did what they did in 2017, we  
21 frankly don't know what they, we don't know what they  
22 were because Lester Eber wasn't involved in any of  
23 that decision making at all, he had nothing to do with  
24 it.

25 THE COURT: I see. So that's why you're saying

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2 you would need some deposition.

3 MR. HERBERT: Absolutely, yes. Yes. I  
4 couldn't tell you today why, I think there's a  
5 question as to whether or not the stock was allocated  
6 amongst the beneficiaries in the summer of 2017, I  
7 think there's a serious question as to whether or not  
8 that was done appropriately. And I don't know why  
9 Canandaigua did it the way they did it and we need to  
10 have some deposition testimony from them to understand  
11 why they did what they did and the way they did it.  
12 And that has ramifications throughout all the issues  
13 relating to who's entitled to which shares of stock  
14 and whether or not this call right fits into the whole  
15 case. So I think that we did discuss this at a prior  
16 conference but I think it's become a much more  
17 complicated issue since then.

18 THE COURT: So from your client's perspective,  
19 there would be the additional deposition of a bank  
20 representative.

21 MR. HERBERT: Absolutely.

22 THE COURT: Okay.

23 MR. HERBERT: I think one thing that's important  
24 to note, in 2017, Canandaigua decided to try to terminate  
25 the trust, Alan Eber Trust, and they filed their petition

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2 in February and it was finally adjudicated in June. Lester  
3 and Wendy Eber, they didn't have anything to do with that  
4 process at all, nothing to do with that. So what the  
5 motivation was behind the bank's filing that petition,  
6 whether or not they thought they were entitled to try to  
7 terminate the trust, because at least on a reading of the  
8 petition, the petition seems illogical to us because it  
9 doesn't seem to be responsive to what the requirements  
10 are in the will to be in a position to terminate the  
11 trust. And then things that happened after that raise  
12 a lot of questions in our mind that we need deposition  
13 testimony.

14 THE COURT: Okay.

15 MR. BROOK: May I say a couple of things to  
16 correct Mr. Herbert on a few things that I think are  
17 really important to what he said?

18 THE COURT: Sure.

19 MR. BROOK: Lester Eber entered an appearance  
20 in the action to terminate the trust, and his lawyer  
21 waived any objection to terminating the trust. That's  
22 why the Court entered an order saying here's how the  
23 assets are going to be distributed. So for Mr. Herbert  
24 to stand up and say they didn't have anything to do  
25 with that is just incorrect. And that lawyer Wendy

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2 Eber said was representing her interests personally as  
3 well. So any objections that they have to Canandaigua  
4 terminating the trust and the Court entering that  
5 order, they had an obligation to enter at the time  
6 when they made an appearance in that case. If they  
7 hadn't made an appearance, like my clients did not,  
8 maybe they'd have some kind of an argument to do it --

9 THE COURT: Why didn't your clients make an  
10 appearance?

11 MR. BROOK: Well, because, frankly,  
12 termination was premature.

13 THE COURT: So why didn't your clients enter  
14 an objection?

15 MR. BROOK: Because at the end of the day the  
16 last thing they wanted was to have the company  
17 business still in the hands of Lester and Wendy Eber.  
18 And as long as the trust was around, there was a  
19 serious risk that, you know, this would go on years  
20 longer as a new trustee has to be appointed, and then  
21 we'd have to be overseeing that trustee.

22 So when Canandaigua said they were going to  
23 just try to terminate the trust and distribute the  
24 shares, my clients made, we made the decision not to  
25 oppose that, but not to support it either.

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THE COURT: But now you're using the basis of that to add new claims to the complaint.

MR. BROOK: Well because, at the end of the day, that order is still a Court Order that is binding on the parties that did enter an appearance there, and it's binding on my clients, too.

THE COURT: Right, but how is it, if your clients had an opportunity to object to that, you didn't appear, you chose not to appear, you chose not to object and now you want to use that transaction as the basis to add a claim against the defendants, is that right?

MR. BROOK: I think Your Honor has it backwards. They're the ones who want to undo that Court Order. We support that Court Order, we have no problem with what that Court did, with what was ordered in it, it was done completely correctly in terms of distributing the assets according to how they needed to be.

THE COURT: Okay.

MR. BROOK: And Lester Eber agreed with that and then years later Canandaigua is saying, well, we need to distribute these shares. And first there were these excuses about a missing stock book. We've

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2 recently had some emails produced to us by  
3 Canandaigua's lawyer that show that, and Your Honor  
4 may remember this, too, so representations had been  
5 made that no one misplaced the stock book for the  
6 company, that was never represented. Multiple emails  
7 from Lester and Wendy's lawyer in that trust action,  
8 in that Surrogates Court action, to Canandaigua's  
9 lawyer saying we can't find the stock book, we're  
10 going to maybe do a special trip up to Rochester to  
11 try to find it.

12           So there was active obstruction going on  
13 trying to prevent the Court's order from going  
14 through. Because what happened was they entered an  
15 appearances, they order went through, and now they  
16 don't want to abide by the order that they were a part  
17 of. And so we're not challenging that, we're simply  
18 saying that we've been relying on that for a long  
19 time, from the first time that we amended the  
20 complaint after that transaction we made it clear that  
21 the trust doesn't exist, that's our understanding.

22           And what Mr. Herbert's actually saying is he  
23 wants to revive the trust, have this Court somehow do  
24 that, even though it's a Surrogates Court order that  
25 has already terminated the trust, I don't know how

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2 that's possible. But the other thing that's really  
3 remarkable about their position is they think that the  
4 trust still exists and should be revived by judicial  
5 fiat, but that Lester Eber doesn't have any duties as  
6 trustee. That somehow only he was relieved of his  
7 duties as trustee. I mean obviously Mr. Gumaer also  
8 passed away, so that Canandaigua is now solely the bad  
9 guy. And what they are really trying to do is they're  
10 trying to take advantage of the fact that we did reach  
11 a settlement with Canandaigua which was very much on  
12 the sidelines on this thing. The only thing they did  
13 wrong was not acting more as trustee and filing suit  
14 when it discovered these transactions earlier. So  
15 they're trying to make Canandaigua into the bad guy as  
16 much as they can and they're trying to delay this  
17 thing. There is no reason why we need to depose  
18 someone from Canandaigua about what they did. Nothing  
19 that they did or didn't do is remotely in dispute. The  
20 only question that this Court can address is a legal  
21 one which is does this Court see the Court's order  
22 from Surrogates Court as having impact or binding  
23 authority here. I mean there's legal issues that might  
24 come into play, but none of that is going to require a  
25 deposition and further delay of this issue.

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THE COURT: Okay.

MR. BROOK: Thank you.

THE COURT: Hold on, let me hear from Mr. Calihan.

MR. CALIHAN: I just want it noted that the Gumaer estate has already asked for both Canandaigua depositions and they've been agreed to.

THE COURT: Um-hmm.

MR. CALIHAN: We may be arguing about the scope of those depositions but we're going to be completing Awk's (phonetic) deposition and then taking the deposition of Mr. Lowenthal. I think there is no dispute but that they are going to go forward.

MR. BROOK: I think the issue is the third Canandaigua deposition.

THE COURT: Okay.

MR. HERBERT: Let's make sure we understand what we're talking about here. Mr. Brook, it's very interesting but that's actually not what happened, okay? Canandaigua, in the winter of 2017, they decided to terminate the trust. They cobbled up a petition to be filed in the Surrogates Court. They cobbled up a final accounting with respect to the termination of the trust. It is noted in the

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2 accounting expressly that Lester Eber had nothing to  
3 do with the preparation of the final accounting, okay?  
4 It is true that when it came on for adjudication, that  
5 Lester Eber did make an appearance there and did  
6 acquiesce in the final order, okay, but all the  
7 termination order did was it ordered that the assets  
8 of the trust as a whole be distributed one-third, one-  
9 third, one-third. It didn't purport to address how any  
10 particular issue was to be allocated amongst the  
11 beneficiaries.

12           So there was a process in July and August of  
13 2017 where the Trust Department people at Canandaigua  
14 came up with a specific allocation of the specific  
15 assets in the trust. Their first attempt at  
16 allocating the assets, we pointed out to them, was  
17 wrong, okay, it had nothing to do with the order from  
18 the Surrogates Court, this was like mop up duties that  
19 Canandaigua had as a trustee. If you look at the  
20 order issued by the Surrogates Court, it's all about  
21 what Canandaigua has to do to finalize the  
22 distribution of the trust assets. There is nothing in  
23 there about what Lester Eber has to do, he didn't have  
24 anything to do. Lester Eber pointed out to the people  
25 at Canandaigua that they did the allocation

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2 incorrectly. Then in the month of August Canandaigua  
3 went back and did a reallocation and it would be our  
4 contention that we're not so sure they did that  
5 correctly, and it does have ramifications on all the  
6 rest of the issues.

7 THE COURT: Okay. Well I'm going to permit you  
8 to ask questions about this in the depositions of the  
9 Canandaigua folks whose depositions have been noticed.  
10 I'm going to --

11 MR. HERBERT: Can I ask you, those are not the  
12 right witnesses though.

13 THE COURT: Oh, so you need to have a  
14 different person from Canandaigua?

15 MR. HERBERT: Right.

16 MR. RAMSEY: The thought was, if Your Honor  
17 read the motion to intervene, we'd do an appropriate  
18 notice and have them produce --

19 THE COURT: Yes, I'm granting the motion to  
20 intervene and then you can notice that deposition. I'm  
21 going to reserve judgment on the amendment to the  
22 complaint, but I will turn to that shortly. So let's  
23 talk about the discovery schedule though, it seems  
24 that you're not going to meet the March 29<sup>th</sup> deadline  
25 to complete fact discovery, you have an expert

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discovery deadline of May 31<sup>st</sup> right now, so I'm going to extend both deadlines by sixty days. And I'm going to schedule another conference, status conference, how would Monday, May 20<sup>th</sup> work?

MR. BROOK: That time, Your Honor?

THE COURT: Let's do 10 a.m. All right, is there anything else that any of the parties wanted to raise at this time?

MR. BROOK: I understand how burdened the Court is, I've clerked, does the Court have any sense of when we might get a ruling on the privilege issues? Because to the extent that we need to do much more discovery at all, that's really the biggest factor.

THE COURT: I understand. I'm working on it.

MR. BROOK: Okay.

THE COURT: All right, then we're adjourned. Thank you.

(Whereupon the matter is adjourned to May 20, 2019, at 10:00 a.m.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Kleeberg, et al. versus Eber, et al., Docket #16cv9517, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: March 25, 2019